



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable
CASE NO 444/2006

In the matter between

N E VHENGANI

Appellant

and

THE STATE

Respondent

Coram: Nugent, Jafta JJA
and Snyders AJA

Heard: 21 MAY 2007

Delivered: 31 MAY 2007

Summary: Evidence – cautionary approach applicable to evidence of a single witness.

Neutral citation: This judgment may be referred to as *Vhengani v The State* [2007] SCA 76 (RSA)

JAFTA JA

[1] The central issues in this appeal are credibility and reliability of a single witness. The appellant was convicted of rape in the Venda High Court (Lukoto J) and sentenced to 20 years' imprisonment. With the leave of this court he now appeals against the conviction.

[2] The facts giving rise to the appellant's conviction and sentence were the following. The complainant testified that on 29 March 2001 she was returning home after visiting a homestead which was a kilometre away from her home at Tshivhambe village in Venda. She was walking alone on a footpath through an orchard when she encountered four men. One of them blocked her way and gagged her with a white cloth. He undressed and felled her on the ground. He unzipped his trousers, came on top and raped her. At that stage his companions were no longer at the scene. It is not clear at what stage they had left. She was not able to identify them but she identified her assailant as the appellant whom she claimed to have known by sight and that his name was Emmanuel of Tshisaulu village.

[3] She escaped from her assailant after he had permitted her to go to urinate. She then ran away and her assailant did not pursue her. It was already 22h00 when she arrived at her home but found that the gate was locked. She went to a neighbour's homestead where she slept. Upon arrival she told Miss Takalani Mukwevho at that homestead that she was being chased by a boy, which was a lie. On the following morning she did not go home but proceeded to another homestead with the view of asking the owner (Ms Phumudzo Mapeta) to accompany her to her mother's place of work. Her mother had already left for work as she normally left

home at 6h00. On meeting her Ms Mapeta asked why she was dirty and she replied by telling her that she had been raped by one Emmanuel whom she described as short and dark in complexion.

[4] Ms Mapeta accompanied her to her mother's place of work. She reported the rape to her mother who took her home. On the advice of her father, they went to lay a charge at a local police station. From there they proceeded to hospital where she was examined by a doctor who completed a report setting out her findings. The medical report, which was handed in at the trial, revealed that there was sexual penetration. In her oral evidence the doctor explained that the bruises she observed on the complainant's private parts were of the nature that could occur during consensual intercourse.

[5] In her testimony Ms Mapeta stated that she saw the complainant seated next to her gate on the morning of 29 March at 08h00. But the other evidence indicates that the witness was mistaken, it was the 30th on that day. Upon asking why she was seated there, the complainant informed her that she had been raped. The witness observed that the complainant was dirty and she was also crying. When the complainant described the person who raped her, she also thought it was the present appellant.

[6] The appellant disputed the allegations against him and raised an alibi as his defence. He stated that in the evening in question he was at home with his mother. In her testimony his mother confirmed the appellant's alibi. The trial court, however, rejected the defence version on the basis of probabilities. Although the reasons given by the trial court for this finding are, in my view not convincing, for purposes of this judgment

I shall assume that the defence was properly rejected.

[7] As to the actual rape and the identity of her assailant, the complainant was a single witness whose evidence called for the cautionary approach. Although the trial court appreciated this, it failed to apply the rule in its judgment. On this issue the learned Judge merely said:

‘Now, let us look at the evidence of the complainant as a single witness. Does it comply with the requirements as laid down in *R v Mokoena* the 1932 case, is she a credible and a reliable witness? The impression I got is that she is a reliable and credible witness.’

[8] In *S v Sauls and Others* 1981 (3) SA 170(A) Diemont JA explained how the rule should be applied by trial courts. The learned Judge said (at 180E):

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Pumpff JA in *S v Webber* 1971 (3) SA 754(A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.’

[9] This rule applies to evidence of single witnesses regardless of their gender. It is not the cautionary rule that was confined to sexual offences only and which was discarded by this court in *S v Jackson* 1998 (1) SACR 470 (SCA). Having rejected the latter rule Olivier JA, however, acknowledged that in cases such as the present the evidence led may warrant a cautionary approach. The learned Judge said (at 476F):

‘In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.’

[10] It is against this background that I now turn to consider the complainant’s evidence. She was 15 years old at the time of the alleged rape. In my view her evidence was unsatisfactory in a number of respects. She alleged that she was attacked at 19h30 and she reached her home at 22h00 without explaining what happened during the intermediate period of two and half hours. The complainant stated that the appellant’s companions did not touch her but later changed to say they had held her before the appellant undressed and raped her. When asked why she lied about having been chased by a boy she said she wanted Miss Mukweho to open the door for her. But in her evidence – in – chief she said the latter ‘opened for me and upon getting inside the house I told her that I am being chased by a certain boy’.

[11] When the complainant was questioned about not reporting to Miss Mukweho that she was raped, she gave inconsistent answers. Her evidence proceeded as follows:

‘And did you inform Takalani as to what had happened to you?’

--- No

Why didn’t you tell her? --- It is because she never asked me.

I see. So why then when you said to her that somebody or there are some guys who are chasing you, what really made you to explain to her that there are some guys who were chasing you? --- I am the one who volunteered that information.

I told her that I am requesting her to open for me since there is a boy who is

chasing me.

So were you telling her the truth? – – – No, it wasn't.

Why then did you decide to lie to Takalani Mukwevho? – – – I realised that she is too talkative and that she can rumour that around in no time.

I see. After you had approached Takalani, why then didn't you request her to accompany you to your homestead during the very same night? – – – She wouldn't have agreed because she was already asleep.

Did you ever request her? – – – No, I didn't.'

[12] The complainant had earlier on stated that when she arrived at her home, she found the gate locked but she did not shout for her parents to open it because they could not have heard her. One would have expected her to furnish this as the reason why she did not ask Miss Mukwevho to accompany her. By seating near Ms Mapeta's gate, the complainant also acted in a manner inconsistent with her stated objective. She had said she went there to ask Ms Mapeta to accompany her to her mother's place of work. She could also not give a plausible explanation for not going home before her mother left for work as she knew that she leaves at 6h00. Her reply to this question was: 'That never crossed my mind'. Judging from her conduct, she was not anxious to report the alleged rape to her parents.

[13] It is clear from what is set out above that there were serious shortcomings in the complainant's evidence which diminish her credibility as a witness. It follows that the trial court fell into error in making the finding that she was a credible witness without first having analysed her evidence and took account of all these shortcomings. I have serious reservations about whether she told the truth. Moreover, she was the only witness on whom the trial court relied for the identification of the appellant. This also called for a careful scrutiny of

her testimony relating to the appellant's identification in order to determine its reliability over and above her credibility.

[14] Due to human fallibility this court has in the past emphasised that the reliability of the observation made by the identifying witness must be tested (see *R v Dladla and Others* 1962 (1) SA 307(A) and *S v Mthetwa* 1972 (3) SA 766(A)). In a case such as the present where the witness says that she knew the accused by sight there must be an enquiry directed at establishing the degree of prior knowledge in addition to the opportunity for correct identification when the circumstances in which it was made are taken into consideration. In *S v Mehlope* 1963 (2) SA 29(A) this court said (at 33B-D):

'In the circumstances of the present case there were three important facets of the evidence of the single witness, the complainant, as to the identity of the appellant as one of the three persons who robbed him. In the first place he said he had often seen the appellant before. The value of this alleged prior knowledge of the man he subsequently recognised at the robbery remained entirely un-investigated. The court did not know how often he had seen this man, or when he had last seen him, or whether he had ever seen him close by or had ever spoken to him or anything at all about the opportunities of accurate observation of the appellant's face afforded on the prior occasions; he said that he recognised him by his face. The magistrate may of course have seen that the appellant's face was of the type which was easy to remember and later to recognise, but he made no finding in that regard.'

See also *S v Zitha* 1993 (1) SACR 718(A).

[15] In this case the complainant said the rape was committed at about 19h30. At that time visibility was not good as it was slightly dark, to the extent that she could not tell the colour of the appellant's attire, but she claims to have identified him by his voice and face. However she disputed that the appellant had spoken to her prior to the

evening in question. Instead she said she had heard his voice when he was conversing with his friends on the occasion she saw him in her village. The trial court did not investigate how far she was from the appellant and his friends when she saw and heard him speak on that occasion. Nor did it investigate whether she saw his face as the evidence does not show whether this was the position or not. The complainant's evidence does not show what time of the day it was when she saw the appellant and the trial court did not inquire into this issue. Consequently it cannot be said that on that occasion she had an opportunity to make an accurate observation of his face or voice.

[16] According to the complainant she again saw him at Bob's soccer ground during day time. But her evidence in this regard was highly unsatisfactory. Her evidence-in-chief went as follows:

'And where else did you see him?

- - - I again saw him at Bob's soccer ground.

Now where is this Bob's soccer ground? - - - That is at Tshisaulu next to Tshilidzini hospital.

Do you know his name? - - - Yes, I knew his name.

Can you tell this Court his name if you know? - - - He is Emmanuel.

When did you start to know that he is Emmanuel? - - - During the year 2000.

Yes, what was happening when you knew him that he is known as Emmanuel?

- - - There was a fight. People were chasing each other and it was said that amongst those that were fighting Emmanuel was one of them.'

[17] The complainant's cross-examination elicited answers which were equally unsatisfactory, she said:

'How did you know that the accused person was also part of that fight?

- - - I heard it from people who said that Emmanuel was part of it, more so

because those people who were fighting were also stabbing each other with bottles.

So how far were you from those people who were stabbing each other with bottles? -- --I was nearer to them but when I realised that they were even stabbing each other with bottles I left.

What time of the day was it? Was it during the day, was it during the night?

-- --It was during the day.

How did you manage to identify the accused person? -- --I heard from people who said Emmanuel was part of it and when I asked who Emmanuel was, the people pointed at him.'

[18] It is clear from the extract quoted above that the complainant's knowledge about the appellant's involvement in the alleged fight was based on hearsay information even though she claims to have been close to the people who were fighting. Even on this occasion she does not say she saw the appellant's face. In these circumstances her alleged prior knowledge of him could not reliably be used in identifying the appellant.

[19] What remains for consideration is the question whether circumstances at the time of the alleged rape were such that a proper and reliable observation of the assailant could be made. As stated above, the complainant testified that it was slightly dark. When asked about the appellant's attire, she said:

'Can you tell this court if you have ever identified the nature of the clothes which the accused person was wearing on that date of the incident? -- -- No, I could not. I see. What made you not identify his clothes? -- -- I did not bother to check how he was clothed, more so because it was slightly dark.'

[20] Once again, the trial court failed to investigate the issue of

visibility which was clearly less than ideal for a proper observation. For reasons unexplained the complainant was unable to identify her assailant's companions even though she had claimed that they had held her before she was raped. Nor was an enquiry made as to time within which the rape occurred. All we know is that she was raped at 19h30 and that after escaping, she reached her home at 22h00 although it was less than a kilometre from the scene. Under these circumstances it is doubtful that she could accurately observe her assailant's complexion. I do not think that the complainant's evidence can be said to exclude all reasonable doubt as to the alleged attack and reliability of her account of what happened on the night in question.

[21] Cumulatively all these defects in the complainant's evidence ineluctably lead to the conclusion that her evidence did not measure up to the requisite standard both in relation to credibility and reliability. Therefore a reasonable doubt and the risk of a mistaken identity exist in the present case and as a result the appellant should have been acquitted.

[22] The appeal is upheld and the conviction and sentence are set aside.

C N JAFTA
JUDGE OF APPEAL

CONCUR) NUGENT JA
) SNYDERS AJA